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In the Supreme Court of the United States

OCTOBER TERM, 1975

SECURITIES AND EXCHANGE COMMISSION, PETITIONER
v.
RICHARD J. COLLINS, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

CITATIONS

Cases:

214-274—76——1

Cases—Continued

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The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 44a–108a)[1] is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1976 (App. 110a), and timely petitions for rehearing and suggestions for rehearing *en*

[1] "App." refers to the appendices to this petition. "C.A. App." refers to the joint appendix in the court of appeals.

banc filed by the Commission and the intervenors, Christiana Securities Company and E. I. du Pont de Nemours and Company, were denied on February 26, 1976 (App. 111a–112a). On May 15, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under the Investment Company Act of 1940, certain transactions between an investment company and a company affiliated with it are unlawful unless exempted by the Securities and Exchange Commission upon a finding that the terms are fair and reasonable and do not involve overreaching. The question presented is whether the Commission, in approving a proposed merger of an investment company into an affiliated operating company, properly valued the investment company essentially on the basis of the market value of its assets rather than on a basis reflecting the substantially lower market value of its own outstanding stock.

STATUTES INVOLVED

Sections 2(a)(3), 17(a), 17(b), and 43(a) of the Investment Company Act of 1940, 54 Stat. 790, 815, 844, as amended, 15 U.S.C. 80a–2(a)(3), 80a–17(a), 80a–17(b) and 80a–42(a) are set forth in App. 113a–116a.

STATEMENT

Section 17 of the Investment Company Act of 1940, 15 U.S.C. 80a–17, governs certain transactions between registered investment companies and "affiliated persons." The Act forbids an affiliated person to purchase any securities or other property from a registered company. Section 17(a)(2). However, the Commission may exempt proposed transactions from this prohibition upon application. Section 17(b) provides: "the Commission shall grant such applications * * * if evidence establishes that—(1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned; * * *"

In this case the Securities and Exchange Commission authorized a proposed merger of a registered investment company, Christiana Securities Company, into its affiliate, the Du Pont Company.[2] Christiana is a closed-end investment company; its 11,710,103 shares of common and 106,500 shares of preferred stock are held by approximately 8,000 investors (App. 46a). The Du Pont Company is a diversified chemical and manufacturing enterprise with 47.5 million shares of common stock outstanding and 225,000 shareholders (App. 47a). The stock is traded on the New York and other

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[2] Christiana and Du Pont are "affiliated persons" because Christiana owns more than 5 percent of Du Pont's voting securities. See Section 2(a)(3)(A) and 2(a)(3)(B) of the Act, 15 U.S.C. 80a–2(a)(3)(A), 80a–2(a)(3)(B).

stock exchanges (*ibid.*). When the merger negotiations were announced on April 28, 1972, 98 percent of Christiana's assets consisted of Du Pont common stock—13,417,120 shares (App. 46a).[3] In effect, each share of Christiana stock represents an indirect holding of 1.15 shares of Du Pont common stock (App. 10a).

Christiana stock, which is not listed on any exchange, sells in the over-the-counter market at a substantial discount from the market value of Christiana's holdings of Du Pont stock. At the time of the merger announcement, this discount was 23 percent (App. 47a). It represented a disparity of approximately $500 million between the net value of Christiana's assets and the market price of its outstanding stock (C.A. App. 635). The discount apparently results from the 7.2 percent tax on inter-corporate dividends received by Christiana from Du Pont (App. 11a, nn. 27, 28) and from the substantial potential capital gains tax on the unrealized appreciation of Christiana's Du Pont stock, which has a very low tax basis (App. 13a–14a).

[3] The remaining 2 percent of Christiana assets consisted of 16,256 shares of Du Pont preferred stock (1 percent of the outstanding shares—valued at the time of the announcement of the proposed merger at $1,124,102), all of the outstanding stock of a newspaper publisher, The News-Journal Company (7,460 shares—valued at the time of the merger announcement at $24,260,000), 69,216 shares of the Wilmington Trust Company (3.5 percent of its outstanding shares—valued at the time of the merger announcement at $2,699,424), and net cash and cash equivalents (after payment of liabilities) of $5,981,367 (C.A. App. 680–685). These other assets total $34,064,893. In addition, Christiana has an income tax refund claim against the United States carried on its books at $11,723,013 (C.A. App. 714–718).

Christiana was formed in 1915 to preserve control by a branch of the duPont family over the Du Pont Company (App. 1a–3a). In recent years Christiana's management concluded that Christiana had outlived its usefulness, and that because of its tax disadvantages and the discount at which its shares sold, it was desirable that its stockholders become direct, instead of indirect, owners of Du Pont stock, through the liquidation of Christiana into the Du Pont Company (App. 5a–7a).

The proposed transaction provides that Du Pont would acquire all of Christiana's assets and would assume its relatively insignificant liabilities. Du Pont would retire the 13.4 million shares of its common stock it receives from Christiana. In exchange for Christiana's assets, Du Pont would issue 13,228,620 of its shares directly to Christiana's shareholders, in a ratio of 1.123 shares of Du Pont for each share of Christiana (C.A. App. 681; App. 6a). Christiana would then disappear as a corporate entity. The Internal Revenue Service has ruled that the merger will be tax-free (App. 93a, n. 4).

The conversion of the Christiana shareholders' investment into direct instead of indirect ownership of Du Pont shares would increase the market value of the Christiana shareholders' holdings by approximately $450 million. For its part, the Du Pont Company would acquire Christiana's assets at a 2.5 percent discount from their actual value, equal to $55.6 million. This is so because the market price of the Du Pont stock it would issue to Christiana share-

holders equals 97.5 percent of Christiana's adjusted net asset value of $2,223,425,827. This amount was determined on the basis of the market price of Christiana's Du Pont stock and Christiana's other assets, less Christiana's liabilities, with certain minor adjustments (C.A. App. 665–668, 683, 685–686, 714–715).

On application to the Commission by Du Pont and Christiana for an exemption under Section 17, three Du Pont shareholders objected. They contended that because Christiana was valued on the basis of its assets rather than on the basis of the much lower market price of its outstanding stock, the proposed merger in providing substantially greater benefits to the shareholders of Christiana than to Du Pont and its shareholders would be unfair. They also argued that the merger would depress the price of Du Pont stock by leading to greater selling pressure. They proposed that the merger terms be modified to give Du Pont a substantial share of the gain to Christiana shareholders from elimination of the 23 percent discount (App. 10a–16a).

The Commission unanimously granted the application (App. 1a–43a).[4] It viewed the proposed transaction as an exchange of equivalents: Christiana's Du Pont stock to be acquired by Du Pont for the Du Pont stock to be issued to Christiana's share-

[4] The matter was heard by an administrative law judge, but the initial decision was waived and the case was directly decided by the Commission.

holders (App. 9a). In approving the valuation of Christiana for purposes of the merger at the market price of Christiana's holdings of Du Pont stock, the Commission said (App. 32a):

> An investment company, whose assets consist entirely or almost entirely of securities the prices of which are determined in active and continuous markets, can normally be presumed to be worth its net asset value.

It ruled that the strategic bargaining position Du Pont might have as a result of the tax disadvantages and the resulting market discount on Christiana shares is not protected by Section 17. On the contrary, the Commission stated, the purpose of that provision is to prevent persons in a strategic position from getting more than fair value (App. 24a–25a).

The Commission found that the transaction would result in no detriment to the Du Pont Company or to the value of its outstanding shares (App. 20a, 26a, 28a). With respect to the objectors' fears that the price of Du Pont stock would be depressed, the Commission concluded that any such consequence would be of brief duration because the merger could not affect Du Pont's intrinsic investment value (App. 29a). It pointed out that Section 17 is designed to protect long-term value, not short-run speculation (App. 27a).

Thus, in the Commission's view any significant departure from net asset value as a basis for the valuation would be unfair, because it would strip long-term investors in companies like Christiana of the intrinsic

worth of the securities which underlie their holdings (App. 33a). The Commission concluded that since the 2.5 percent discount agreed upon was within the range of fairness, the terms and conditions of the merger satisfy Section 17, whether or not there was arm's length bargaining (App. 35a–36a).

A divided court of appeals reversed (App. 45a). The court held that the Commission had erred as a matter of law in ruling that Christiana "should presumptively be valued on the basis of the market value of its principal asset, common stock of Du Pont" (*ibid.*). It ruled that the Commission should have considered "the value of what Christiana shareholders are giving in exchange" (App. 56a), which it assumed was the current market worth of Christiana's stock (App. 58a). The court concluded that the Commission therefore should have given substantial weight to the market discount for Christiana's stock, as well as to the net asset value of its portfolio and other relevant factors (App. 54a, 56a, 68a, 86a). It held that Section 17 requires that the terms of a merger between an investment company and its affiliate must be within the range of an arm's length negotiation (App. 61a), that this transaction is not within that range (App. 73a–91a), and that the Commission's determination that the transaction satisfies Section 17 was invalid.

Judge Stephenson, dissenting, agreed with the Commission that the merger involved an exchange of equivalents (App. 92a–93a) and that the proper measure of the value of an investment company is its net asset value (App. 98a–99a). He concluded that Section 17 does not bar the Commission from adopting this stand-

ard, because the determination of fairness is " 'in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts.' " *Securities and Exchange Commission* v. *Chenery Corp.*, 322 U.S. 194, 209 (App. 99a–100a). In Judge Stephenson's view, a discount from Christiana's net asset value appreciably higher than the 2.5 percent the Commission found fair " 'would divest Christiana stockholders of a significant portion of the intrinsic investment values to which they are legally and equitably entitled' and thus 'run afoul of the Act' " (App. 101a).

An equally divided court denied rehearing *en banc* (App. 111a–112a).

REASONS FOR GRANTING THE WRIT

1. This case presents an important question in the administration of the Investment Company Act of 1940: on what basis should a closed-end investment company be valued under Section 17(b) of the Act when the investment company is eliminated and in effect liquidated through a merger? The Securities and Exchange Commission has uniformly held, on the basis of its administrative expertise, that the net asset value of the company is the proper measure. See *infra*, p. 15. The court of appeals, however, has rejected the Commission's settled interpretation of the Act and has ruled that the major criterion is not the value of the investment company's assets being acquired by the other company but the discounted price at which the investment company's shares sell in the market place.

The issue is important both to the Commission in administering the Act and to shareholders in closed-end investment companies. The significance of the issue to the latter is dramatically illustrated by this case. By issuing its own stock as consideration for the merger, the Du Pont Company would acquire assets of Christiana with a net value of $2.2 billion, at a 2.5 percent discount amounting to $55.6 million. The disparity between the net asset value of Christiana, consisting almost entirely of Du Pont stock, and the market price of Christiana stock is $500 million. By becoming direct owners of Du Pont stock, thus eliminating the disparity, the value of the investments of Christiana's shareholders would be increased by about $450 million. The objecting Du Pont stockholders urged before the Commission, however, that the discount favoring Du Pont should have been substantially increased—up to a maximum of half the disparity ($250 million)—as the price of Du Pont's cooperation.

Although the elimination of Christiana through its merger into Du Pont provides significant financial advantages for the Christiana shareholders, it imposes no corresponding detriment upon Du Pont and its shareholders. The proper basis for valuing Christiana will thus determine whether Du Pont should receive a substantial windfall at the expense of Christiana's shareholders.

The court of appeals' rejection of the Commission's settled interpretation would cause serious problems in the administration of the Act. Investment company mergers with affiliates are not uncommon. (See n. 6,

infra, p. 15.) Indeed, they further the important public policy of eliminating unnecessary corporate holding companies (App. 21a, n. 42). Prior to the decision of the court of appeals in this case, the Commission had made clear that it would not value investment companies under Section 17 other than on the basis of net asset value. In rejecting this interpretation, the court of appeals' decision creates substantial uncertainty about the standards for determining the fairness of Section 17 transactions, and thus is likely to discourage such transactions; it also makes the Commission's role in applying the statute more difficult, and creates the likelihood of litigation over the application of those standards in particular cases. This likelihood is increased by the facts that venue to review Commission orders under the Act (15 U.S.C. 80a-42) lies in any circuit where the petitioner resides or does business or in the District of Columbia Circuit, and that investors who can challenge Commission orders under Section 17 are widely dispersed throughout the country.

2. The court of appeals erred in rejecting the Commission's settled view that under Section 17(b)(1) the proper basis for valuing an investment company in a merger is the net asset value of that company rather than the discounted market price of its shares. Section 17(b)(1) requires the Commission to exempt transactions between affiliates if other conditions are met and the evidence establishes that

> the terms of the proposed transaction, including the consideration to be paid or received, are

> reasonable and fair and do not involve overreaching on the part of any person concerned
> * * *

This statute provides for Commission oversight of transfers of an investment company's assets to an affiliate. Its purpose, as reflected in its language, is to assure investors that the transaction is fair and reasonable and free from overreaching. The court of appeals' construction of the statute will defeat this purpose and will undermine the effectiveness of this provision in protecting investment company shareholders.

Under the court's construction of Section 17, an affiliate may acquire the assets of an investment company for an amount substantially less than the actual market value of the assets. Section 17 compels this result, according to the court of appeals, because fairness under that section should be defined in terms of the bargain the parties would reach through arm's-length negotiations. The court reasoned that, since Du Pont has a strategic bargaining position resulting from the tax disadvantages of Christiana and from the unfavorable position of Christiana shareholders because of the substantial discount at which Christiana stock has traditionally sold, the terms of the merger must reflect this bargaining advantage as the price for liquidation of Christiana by absorption into Du Pont.

There is nothing in the Act that supports this interpretation of Section 17(b). On the contrary, the reason for providing Commission oversight is to pre-

vent overreaching by persons in a strategic position, *i.e.*, to prevent them from exacting more than the fair value of the assets they receive from the investment company at the expense of disadvantaged investors.[8] The court of appeals' construction of the Act would permit the very kind of overreaching that Section 17 (b) is designed to prevent. It maximizes the opportunities for exploiting any leverage one party to a merger may have and it is likely to create windfalls for affiliates in strategically advantageous bargaining positions.

An investment company's assets are merely a portfolio of securities whose price is generally determined by the disinterested auction process prevailing on the nation's securities markets. See, *e.g.*, *Central States Electric Corp.*, 30 S.E.C. 680, 699–700. The market value of those securities is the same no matter who the buyer or the seller is or what the tax consequences to the seller may be. Consequently, when an affiliate acquires all the assets of an investment company, the Commission has solid grounds for concluding that under Section 17 the consideration the investment company shareholders receive must approximate the value of what the affiliate acquires: the investment company's net asset value based upon the market price of its portfolio.

The merger of an investment company into an affiliate is, in a practical sense, a liquidation of the invest-

[8] See Securities and Exchange Commission, Report on the Study of Investment Trusts and Investment Companies, H.R. Doc. No. 279, 76th Cong., 1st Sess. 1411, 1414, 1422, 1427–1428 (1939–1940).

ment company. In a traditional liquidation, the company's portfolio would be sold at market prices or distributed directly to the shareholders, who would thus receive the value of the portfolio shares. The fact that, because of the adverse tax consequences such a direct liquidation would have for Christiana and its shareholders, the transaction was structured in the form of a merger, does not change the fundamental character of what takes place. In either situation, the transaction is a method of distributing to the investment company shareholders the underlying portfolio of their company, and the fair measure of what they are to receive is the value of those assets (App. 23a–25a).

The court of appeals reasoned, however, that Section 17(b)(1) requires the Commission to "look to the value of what Christiana shareholders are giving in the exchange" (App. 56a), and it concluded that that value was measured by the market price of Christiana stock. In fact, however, what Christiana's shareholders are giving in the exchange is the net asset value of the securities portfolio of Christiana, consisting primarily of Du Pont stock. In exchange, they will receive Du Pont stock.

The consideration Christiana is giving to Du Pont is not its shareholders' stock, which disappears along with Christiana, but its own portfolio of securities: 13.4 million shares of Du Pont stock and other securities. Du Pont in turn will distribute to the Christiana shareholders a slightly smaller number of Du Pont shares. As the Commission held, therefore, in eco-

nomic reality this transaction is an exchange of equivalents, *i.e.*, an exchange of the indirect interest that the Christiana shareholders now have in Du Pont stock for a direct interest in Du Pont.

The Commission has long recognized that investment companies, unlike operating companies, have special characteristics which require valuation upon the basis of their underlying assets rather than the discounted market price of their stock. An operating company may properly be valued primarily not on the basis of its assets, but on the company's ability to utilize those assets to produce earnings. But the value of an investment company, which has no business other than acquiring, holding and selling securities, necessarily reflects only the market price of its portfolio. See *Central States, supra.*

For this reason the Commission over the years has consistently valued investment companies under Section 17(b)(1) on the basis of their net assets.[6] Its

[6] There have been a number of cases, although seldom with any discussion, in which the Commission has approved investment company mergers with affiliates at a consideration whose value reflected the investment company's net asset value. These include the following: *Cheapside Dollar Fund*, Investment Company Act Releases Nos. 9038 and 9085 (975); *Chemical Fund*, Investment Company Act Releases Nos. 8773 and 8795 (1975); *ELT Inc.*, Investment Company Act Releases Nos. 8675 and 8714 (1975); *The Citizens and Southern Capital Corporation*, Investment Company Act Releases Nos. 7755 and 7802 (1973); *Abacus Fund*, Investment Company Act Release No. 7094 (1972); *Huyler's*, Investment Company Act Releases Nos. 5773 and 5809 (1969); *Eastern States Corporation*, Investment Company Act Releases Nos. 5693 and 5711 (1969); *Townsend Corp.*, Investment

settled position has thus been that, as in the application of other provisions of the federal securities laws (cf. *Niagara Hudson Power Corp.* v. *Leventritt,* 340 U.S. 336, 346–348; *Securities and Exchange Commission* v. *Central Illinois Securities Corp.,* 338 U.S. 96,

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Company Act Release No. 4505 (1964); *Harbor Plywood Corporation,* 40 S.E.C. 1002; *Delaware Realty Investment Company,* 40 S.E.C. 469; *Detroit & Cleveland Navigation Company,* Investment Company Act Releases Nos. 3082 and 3099 (1960); *International Mining Corporation,* 37 S.E.C. 209. We have found no case where the merging investment company has not been valued, to the extent its assets were readily marketable securities, on the basis of the market for those securities. While a number of the foregoing cases were uncontested, an agency's consistent administrative interpretation may be established by consent orders as well as by litigated decisions. *Federal Trade Commission* v. *Mandel Brothers,* 359 U.S. 385, 391.

The court of appeals stated that it was "not confronted with a consistent interpretation of the Act by the agency charged with its enforcement meriting deference by a reviewing court" (App. 66a). That statement was based on a misreading of many of the foregoing decisions. For example, the court cited *Townsend Corp., supra,* as a Commission decision which approved the valuation of an investment company on the basis of factors other than its net asset value. In fact, however, the investment company's earnings were not, as the court stated, used as a separate valuation factor different from asset value; rather they were used to compute the value of some of the investment company's assets which did not have an active market—its 100 percent ownership of certain radio stations. The court also cited *Central States Electric Corp.,* 30 S.E.C. 680, as a case where some other factor—the capital gains tax on the unrealized appreciation of assets—was used to depart from net asset value. The potential capital gains tax in that case, however, was a potential liability of the company which had to be subtracted from asset value to determine net asset value. The court failed to note that in that case the Commission stated that "it is natural that net asset value based upon market prices [of the assets] should be the fundamental valuation criterion * * * in the

152,) Section 17(b)(1) does not require that the leverage of parties to a merger who have strategically advantageous bargaining positions be recognized in valuing investment companies.

This judgment, reflecting as it does the "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[7] Here, not only are there no such indications, but, as shown above, the Commission's interpretation effectuates the underlying policy of Section 17 to protect shareholders of investment companies from over-reaching by affiliates.[8]

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investment company field" (*id.* at 700) and that "[i]n fact this method of valuation is a ***basic requirement*** of the Investment Company Act" (*id*, at 700, n. 11) (emphasis added). Certain other cases the court cited as reflecting departures from net asset value either did not involve the valuation of investment companies at all (*Talley Industries Inc.*, Investment Company Act Release No. 5953 (1970) (operating companies)); or involved the valuation of companies which, although registered under the Act as investment companies, were actually of a hybrid nature—*i.e.*, part investment company business and part operating business. *Electric Bond and Share Co.*, Investment Company Act Release No. 5215 (1967); *Southeastern Capital Corp.*, Investment Company Act Releases Nos. 4110 and 4113 (December 23, 1964 and January 12, 1965); *New York Dock Co.*, 38 S.E.C. 754; *Century Investors, Inc.*, 40 S.E.C. 319. Since the companies were, in part, operating companies, it was appropriate to accord some weight to the market price of the companies' own shares.

[7] *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381, quoted with approval in *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421. See also *Udall* v. *Tallman*, 380 U.S. 1, 16–18.

[8] The court of appeals stated (App. 67a–72a) that its analysis was supported by cases under the Interstate Commerce Act and the

As Judge Stephenson's dissent observed, in reviewing the Commission's determination in this case, the court of appeals should have been guided by this Court's pronouncement in *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 209:

> The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by

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Internal Revenue Code. The Commission's decision here is not inconsistent with the standards applied to rail mergers under *Schwabacher* v. *United States*, 334 U.S. 182, cited by the court of appeals. For that case held that fairness under Section 5 of the Interstate Commerce Act is to be governed by the value—in terms of current worth—of the shareholders' contribution to the merger, 334 U.S. at 199. That current worth, for shareholders of Christiana, is the net asset value of the securities being acquired by Du Pont.

The method of valuing property under the Internal Revenue Code is governed by specific regulations requiring valuation at the estimated arm's-length bargaining price. But, as this Court held in *United States* v. *Cartwright*, 411 U.S. 546, that price must be determined in the correct market, *i.e.* the market in which the property being transferred is traded. In *Cartwright*, which involved the valuation of open-end investment company shares, the market was the issuing company, which was required to redeem the shares at their net asset value. Here, the property being transferred is Christiana's portfolio, at a net asset value reflecting the price of those securities on the market where they are traded. Indeed, Section 2(a)(39)(B) (15 U.S.C. 80a-2(a)(41)(B)) states that '[v]alue', with respect to the assets of registered investment companies * * * means * * * with respect to securities for which market quotations are readily available, the market value of such securities." Despite the discount at which outstanding shares of closed-end investment companies are traded, the Act provides in Section 23(b) (15 U.S.C. 80a-23(b)) that "[n]o registered closed-end company shall sell any common stock of which it is the issuer at a price below the current net asset value of

appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See *Republic Aviation Corp.* v. *Labor Board,* 324 U.S. 793, 800. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

Under that standard the Commission's approval of the merger, reflecting its experience in appraising financially and economically intricate transactions should have been affirmed.[9]

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such stock." Thus, whatever may be the criterion under other statutes, net asset value is the standard of the Investment Company Act.

[9] The court's error is emphasized by the court's unusual step of appointing a "contract consultant," whose duties "were to assist the Court in understanding the record in this case and to prepare reports and memoranda for this Court in connection with that function." (App. 91a, n. 40) If the court believed that it needed clarification or assistance in understanding the record, the appropriate procedure was to remand to the Commission. See *Berko* v. *Securities and Exchange Commission*, 297 F. 2d 116, 118–119 (C.A. 2), where then Circuit Judge Marshall pointed to the differences in the functions of a court of appeals' reviewing a decision of a lower court and reviewing that of an administrative agency, concluding in a case involving the latter situation:

"Because this case raises substantial questions, and we believe clasification necessary, we must remand."

See also *District 65, Retail, Wholesale and Department Store Union* v. *National Labor Relations Board*, 294 F. 2d 364, 370 (C.A. 3); Davis, *Administrative Law Treatise*, ¶¶ 16.05, 16.12 (1958).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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